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No. 84-9

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY
and CECILIA STEVENSON,
Petitioners,
v.
DORIS RUSSELL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT FOR UNITED STEELWORKERS OF AMERICA, AFL-CIO:CLC

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BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT FOR UNITED STEELWORKERS OF AMERICA, AFL-CIO:CLC

INTEREST OF AMICUS CURIAE

The amicus curiae United Steelworkers of America, AFL-CIO:CLC ("Steelworkers") respectfully submits this brief in support of Respondent Doris Russell, pursuant to Rule 36 of the Supreme Court Rules. Counsel for both Petitioner and Respondent have consented to the submission of this brief.

Amicus curiae has significant interest in the precedent which the Supreme Court will set in this proceeding. A complete reversal of the Ninth Circuit opinion below, and a blanket prohibition of punitive damages and extra-

contractual compensatory relief in ERISA cases, will have deleterious effect upon Steelworker members and retirees.

The Steelworkers, a labor organization, has approximately 900,000 active members and 300,000 retirees. Almost all of these persons are participants in pension plans and health insurance plans established and governed by ERISA. Practically all of these plans are "employer-controlled." In other words, unlike the many joint labor-management trusts which support Petitioner Massachusetts Mutual's position as amici curiae in this case, few if any Steelworker plans are "Taft-Hartley" plans. Accordingly, in the typical plan covering a Steelworker, the employer itself or its designee is the plan trustee and sole administrator. The Union has no involvement with the investment of plan assets or administration of the plan.

Presently, particularly in plant closing and strike situations, many of these employer-fiduciaries are improperly terminating or reducing plan benefits, and they are doing so for their own personal gain. Such class-wide terminations or reductions injure hundreds or even thousands of plan participants at each plant. Invariably, the employer-fiduciary's conduct runs counter to the parties' intent and defeats clear expectations of the participants. Judging from the weakness of the employers' defenses in these cases, it is clear that these employer-fiduciaries believe they have nothing to lose, and possibly much to gain, through violating participant rights. Whatever the employer "saves" by avoiding its obligations goes directly into its own coffers. Within the past three years alone, Steelworker members and retirees have been forced to institute at least 30 ERISA lawsuits to remedy these wholesale benefit terminations or reductions.

Only the sanction of punitive damages can deter these malicious, wilful and wanton breaches of fiduciary duty. Likewise, without the availability of extra-contractual

compensatory relief where an employer's conduct causes clearly foreseeable suffering, employers will continue to inflict such suffering on participants.

SUMMARY OF ARGUMENT

Below, the Ninth Circuit held that ERISA permits punitive damage awards against fiduciaries for breach of their fiduciary duties "in only very limited circumstances." Such awards may be made only if the fiduciary acted with *"actual malice* or *wanton indifference* to the rights of a participant or beneficiary." *Russell v. Massachusetts Mutual*, 722 F.2d 492 (9th Cir. 1984). (emphasis added). Since discovery herein is not yet complete and plaintiff Russell has not even had the opportunity to amend her complaint, the Court "intimate[d] no view as to [her] right to recover punitive damages" in this particular case. 722 F.2d at 492.

The Ninth Circuit's narrow holding as to punitive damages and "extra-contractual compensatory" remedies comports with Congressional intent, as evidenced in the legislative history and in the statutory language. In enacting ERISA, Congress unequivocably expressed its desire both to compensate victims of fiduciary breach and to *deter* such breaches by providing the full range of legal and equitable remedies. Moreover, Congress patterned the statute after traditional trust law principles under which courts allow trust beneficiaries to recover punitive damages to remedy serious breaches of fiduciary duty. Petitioners' novel position that the remedies set forth in Section 409 (29 U.S.C. Section 1109) are available only *to the plan* is contrary to the statute's plain language. Section 502(a)(2) (29 U.S.C. § 1132(a)(2)), allows a *participant* to bring suit for "appropriate relief" under Section 409. In turn, Section 409 provides that a fiduciary breaching its duties "shall be subject to such other equitable or remedial relief as the court may deem ap-

propriate." Petitioners cite no case law or legislative history to support their novel position.

The Supreme Court should not be swayed by the peculiar and, as yet, undeveloped fact situation now before it. Petitioners and their amici supporters characterize the alleged breach of fiduciary duty (i.e., untimely processing of Russell's claim) as a technical, procedural violation of plaintiff Russell's rights. If that prove the case, on remand Russell cannot show the "maliciousness" or the "wanton indifference" necessary to recover punitive damages. But this does not justify a total ban on punitive damages for all ERISA cases. We bring to the Court's attention those situations where self-interested employers have terminated benefits on a class-wide basis, causing injury and grave disappointment to large numbers of vulnerable, retired persons. We also note actual cases in which self-dealing employers have used plan assets improperly, thereby adversely affecting retirement income security of participants. In deciding this case, the Court must not lose sight of such cases—cases which affect many more people than does an individual claims-processing case such as Ms. Russell's.

Nor should the picture painted by the joint labor-management trust fund amici sway the Court. It is true that the fiduciaries of such trust funds reap no personal gain when they decide adversely to individual participants. Since an equal number of labor and management representatives sit on their trustee boards, theirs is truly a neutral decision-making procedure with built-in checks and balances. However, most plans lack these safeguards. In fact, 75 to 85 percent of this nation's plan participants are in employer-controlled plans where the employer-fiduciary stands to gain when its decisions harm participants.

In sum, to deter the most flagrant breaches of fiduciary duty—those committed with actual malice or wanton in-

difference to participants' right—ERISA requires punitive and extra-contractual compensatory damages in its remedial arsenal.

ARGUMENT

A. ERISA's Statutory Language and Legislative History Mandate that Exemplary Damages and Extra-Contractual Compensatory Relief Be Available to Victims of Serious Fiduciary Breaches

Petitioner Massachusetts Mutual and its supporting amici urge a tortured statutory construction in contending that participants have no right to relief under Section 409(a) of ERISA (29 U.S.C. § 1109(a)). Petitioners argue that only *the plan* can make recovery under Section 409(a).[1] Petitioners make this argument despite the clear wording of the statute. Section 502(a)(2) (29 U.S.C. § 1132(a)(2)) states that "(a) A civil action may be brought— . . . (2) . . . *by a participant* [or] *beneficiary . . . for appropriate relief under § 409.*" In turn, Section 409(a) provides:

> "**§ 1109. Liability for breach of fiduciary duty**
>
> (a) *Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter* shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and *shall be subject to such other equitable or remedial relief as the court may deem appropriate*, including a removal of such fiduciary. A fiduciary

[1] See Petitioners' Brief, pp. 12-13. See also Brief of Alaska Fishermen's etc. Trust, pp. 11-12; Brief of American Council of Life Ins., etc., pp. 9-10. Significantly, Petitioners did not make this argument in either of the Courts below.

may also be removed for a violation of section 1111 of this title." (emphasis added).

Petitioners ignore that Section 409 confers an action on *participants* and authorizes "such other equitable or remedial relief as the court may deem appropriate." Instead, Petitioners focus upon the earlier clauses of Section 409(a) which state that losses or profits resulting from fiduciary breach must be restored "to the plan." Petitioners' argument is unpersuasive; had Congress intended to limit all Section 409(a) recoveries "to the plan," it most certainly would have inserted the limiting language after the broad phrase, "equitable or remedial relief as the court may deem appropriate." The failure to include the limitation signifies an intent to afford participants a direct right of recovery, and to provide flexible and meaningful remedies.

Moreover, when read in context with other provisions of the statute and the legislative history,[2] it is clear that participants may recover under Section 409, and that among the forms of the broad relief available are exemplary damages and extra-contractual compensatory relief. This is in accord with ERISA's mandate that its remedial provisions are to be liberally construed. *Eaton v. D'Amato*, 3 Employee Benefit Cases 1003, 1005 (D.D.C. 1980); *Gilliam v. Edwards*, 492 F. Supp. 1255, 1261, 1265 (D.N.J. 1980); *Matter of M&M Transp. Co.*, 3 B.R. 722 (S.D.N.Y. 1980); *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629 (W.D. Wis. 1979).[3]

[2] The Ninth Circuit opinion and Respondent Russell's brief contain a comprehensive analysis of these provisions and of the legislative history. Amicus Steelworkers will not repeat this statutory analysis.

[3] See also, *Laborers' Fringe, etc. v. Northwest Concrete, etc.*, 640 F.2d 1350, 1352 (6th Cir. 1981) (ERISA's "enforcement provisions should have teeth: the provisions should be liberally construed 'to provide . . . participants . . . with broad remedies for redressing and preventing violations of the Act' "); see also *Freund v. Marshall, supra*, 485 F. Supp. at 643 (the "guiding principle" in determining recovery under Section 409(a) "should be to enforce the remedy which best carries out the purposes of the Plan and *is most advantageous to the participants and beneficiaries of the Plan*;" (emphasis added)).

In light of the manifest legislative intent, it is not surprising that many courts have allowed participants to directly recover exemplary damages or awards for mental anguish under Section 409(a)—without even considering whether only *the plan* can recover under that provision. *Russell, supra*; *Bobo v. 1950 Pension Plan*, 548 F. Supp. 623, 626 (W.D.N.Y. 1982); *Jiminez v. Pioneer Diecasters*, 549 F. Supp. 677 (C.D. Cal. 1982); *Free v. Gilbert Hodgman, Inc.*, 3 Employee Benefit Cases 1010 (N.D. Ill. 1982); *Eaton v. D'Amato, supra*, 3 Employee Benefit Cases 1003; *cf.*, *Kann v. Keystone Resources, Inc.*, 575 F. Supp. 1084, 1094-95 (W.D. Pa. 1983) (holding punitive damages available in ERISA cases, but not mentioning Section 409(a); fact situation suggests a clear violation of Section 409(a)). Other cases denied such relief under ERISA. E.g., *Whitaker v. Texaco, Inc.*, 566 F. Supp. 745, 751 (N.D. Ga. 1983). But in so holding, these cases have never implied a limitation upon Section 409(a)'s relief "to the plan." In their brief, Petitioners cite no authority for this novel proposition.[4] See Petitioners' Brief, pp. 12-13.

[4] Moreover, many of the decisions upon which Petitioners rely which have denied punitive damages do not address Section 409(a). Instead, they hold punitive damages unavailable under Section 502(a)(1)(B) or other provisions. E.g., *Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820, 825-26 (7th Cir. 1984); *Diano v. Central States, etc.*, 551 F. Supp. 861 (N.D. Ohio 1982); *Calhoun v. Falstaff Brewing*, 478 F. Supp. 357 (E.D. Mo. 1979).

In any event, limiting a Section 409(a) recovery to "plans" would often preclude any remedy at all. This is so because most employer-controlled welfare benefits (and even some pension benefits) are *unfunded.* See discussion *infra* at pp. 13 to 14. Therefore, when an employer's fiduciary breach results in unlawful profits which exceed participants' out-of-pocket loss (e.g., in an insurance termination situation—see *infra* at p. 18), there is no plan fund into which the Section 409(a) recovery of unlawful profits can be paid.

Petitioners also emphasize, correctly, that Congress modelled ERISA's fiduciary requirements after "principles developed in the evolution of the *law of trusts.*" Petitioners' Brief, p. 18 (citing legislative history and *Donovan v. Bierwith*, 680 F.2d 263, 271 (2d Cir.), *cert. denied*, 459 U.S. 1064 (1982); see also *Leigh v. Engle*, 727 F.2d 113 (7th Cir. 1984)).[5] However, Petitioners then assert that, because trust law is *equitable* but punitive damages are a *legal* remedy, Congress could not have intended to authorize punitive awards under ERISA.

Petitioners' argument fails for several reasons. First, it rests on an unduly formalistic and archaic distinction between courts of law and courts of equity. The "modern" view is that punitive damages are recoverable in equitable, as well as in legal, proceedings. *Charles v. Epperson & Co.*, 258 Iowa 409, 137 N.W. 2d 605, 618 (1965); *Hedworth v. Chapman*, 192 N.E. 2d 649, 650-51 (Ind. App. 1963); 22 *Am. Jur.* 2d, Damages § 239, p. 327 and footnote 10 (collecting authorities).

[5] In fact, as courts have recognized, "in enacting ERISA Congress made more exacting the requirements of the common law of trusts relating to employee benefit trust funds." *Donovan v. Mazzola*, 716 F.2d 1226, 1231 (9th Cir. 1983); *Sinai Hosp. of Baltimore v. National Benefit Fund, etc.*, 697 F.2d 562, 565-66 (4th Cir. 1982).

Second, Petitioners' law-equity distinction is particularly outmoded in the context of ERISA, a comprehensive employee benefit statute which authorizes "remedial" relief, "equitable" relief, as well as "sanctions." ERISA's legislative history shows that, in using these terms, Congress expressed its desire to afford even broader remedies than those available under equitable trust law. H.R. Report No. 533, 93d Cong., 2d Sess., *reprinted in* Legislative History of the Employee Retirement Income Security Act of 1974, Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate (1976) (hereinafter "Legislative History"), pp. 2358-60 ("reliance on conventional trust law often is insufficient to adequately protect the interests of plan participants and beneficiaries" and mandating ready "access to the courts"); S. Rep. No. 127, 93d Cong., 2d Sess., *reprinted in* Legislative History, p. 615 (same). Accordingly, courts recognize that "application of traditional trust law principles may, in some instances, conflict with Congress' desire to *eliminate barriers to the protection and enforcement of rights in ERISA-covered benefits plans.*" *Thornton v. Evans*, 692 F.2d 1064, 1079 (7th Cir. 1982) (emphasis added); see also *Free v. Briody*, 732 F.2d 1331, 1337-38 (7th Cir. 1984).

Finally, Petitioners' argument simply ignores those many decisions grounded on general fiduciary and trust law concepts which allow punitive damages. Those decisions permit exemplary relief where the fiduciary engages in self-dealing or other wilful or malicious misconduct. *Palmer v. Fuqua*, 641 F.2d 1146, 1160-61 (5th Cir. 1981) (imposing a constructive trust and awarding exemplary damages for breach of fiduciary duty, stating: "[E]xemplary damages will not be awarded for a mere breach of contract. The instant suit, however, is not an action for a mere breach of contract; this is an action for . . . breach of fiduciary duty . . ."); *Financial General Bank-*

share, Inc. v. Metzger, 523 F. Supp. 744, 773-74 (D.D.C. 1981) (defendant's conduct "exhibits a sufficiently wanton and reckless disregard for his fiduciary obligations to support an award of punitive damages"); *Capitol Fed. Sav. & Loan Ass'n v. Hohman*, 682 P.2d 1309, 1310-11 (Kan. 1984) (to remedy fiduciary breach, "a court may award punitive or exemplary damages as incidental to equitable relief [collecting authorities]"); *Manges v. Guerra*, 673 S.W. 2d 180, 184 (Tex. 1984) ("Recovery against a breaching fiduciary is not limited to an accounting of profits received by the fiduciary, but can also include exemplary damages."); *Texas Bank & Trust Co. v. Moore*, 595 S.W. 2d 502, 510 (Tex. 1980) (same); *International Bankers Life Ins. Co. v. Holloway*, 368 S.W. 2d 567, 584 (Tex. 1963) (same); *Wisconsin Avenue Associates v. 2720 Wisc. Ave. Coop. Assoc.*, 441 A.2d 956, 961-62 (D.C. App. 1982) (affirming punitive damages for breach of fiduciary duty count, as distinct from fraud count). That Congress patterned ERISA's fiduciary requirements after these trust law principles only buttresses the Ninth Circuit's holding for exemplary damages under ERISA.

B. Exemplary Damages and Extra-Contractual Compensatory Relief are Necessary to Deter Serious Breaches of Fiduciary Duty, Particularly where an Employer-Fiduciary is in a Conflict-of-Interest Situation

Twenty-three of the twenty-five amici supporting Petitioner Massachusetts Mutual are multiemployer, joint labor-management trust funds established pursuant to Section 302(c) of the Taft-Hartley Act (29 U.S.C. § 186 (c)).[6] Those funds are financed by contributing employers who pay specified amounts into separate segregated trust funds: independent trustee Boards distribute benefits. Equal numbers of labor and management representatives sit on these trustee boards which process benefit claims and interpret plan documents. Generally, members of these neutral boards may not gain personally by making a decision adverse to participants. The money "saved" by denying claims or restrictively interpreting class-wide eligibility requirements simply remains in the trust, and will still be used exclusively for the benefit of all participants. The assets of the fund can never revert to the trustees or to the employers. 29 U.S.C. § 186(c); Levin, N.A., *ERISA and Labor-Management Benefit Funds* (2d Ed., 1975), pp. 4-5.

[6] See Brief of Pipe Trust, etc., p. 3; Brief of Motion Picture Health & Welfare Fund, p. 2; Brief of Northern California Carpenters, etc., p. 3; and Brief of Alaska Fishermen's Union-Salmon Canners Pension Trust, etc., p. 2.

It is largely because of these built-in safeguards in Taft-Hartley trust situations that Courts ordinarily employ a deferential standard in judging the trustees' actions. Courts uphold the trustees' interpretation of plan documents unless it is "arbitrary and capricious." *Rehmar v. Smith*, 555 F.2d 1362, 1371 (9th Cir. 1976). If the trustees' interpretation is one of several reasonable alternatives, courts do not intervene. *Miles v. New York Teamsters Pension Fund*, 698 F.2d 593, 599-601 (2d Cir. 1983), *cert. denied*, 104 S.Ct. 105 (1983); *Mestas v. Huge*, 585 F.2d 450, 453 (10th Cir. 1978).

The trust fund amici herein support Petitioner Massachusetts Mutual because they fear that the availability of exemplary damages and extra-contractual compensatory relief will have "drastic" consequences for the administration of their trusts. They contend that the mere possibility of obtaining such relief will discourage their trustees from serving, will inhibit trustees' decisions, and will encourage protracted litigation. (See e.g., Brief of Pipe Trust, etc., pp. 6, 10). We believe these fears are

unfounded. Because of the built-in safeguards which protect participants in Taft-Hartley plans, a disgruntled claimant could rarely, if ever, prove the higher standard of culpability for punitive damages which the Ninth Circuit in *Russell* prescribes. That a plaintiff would meet the standard becomes even more unlikely when the trustees are accorded their due deference under the "arbitrary and capricious" test.[7]

More than the unlikelihood of the trust fund amici's dire predictions, the Court must bear in mind that these amici's perspective is a narrow one, not typical of most ERISA plans. Trust fund amici would have the Court believe that all or most of the nation's plan participants enjoy the safeguards of neutral joint labor-management trustee boards. In fact, such multiemployer trusts cover only approximately 17% of the nation's pension plan participants,[8] and 25% of welfare benefit plan participants.[9] Conversely, the vast majority participate in *employer-controlled* plans. In those plans, the fiduciary-administrators are exclusively management representatives or outside insurance companies acting at the behest of management. There are no employee or union representatives to keep the management-fiduciaries in check.[10] In most cases, the principal fiduciary is the employer itself.

In contrast to the Taft-Hartley context the employer-controlled fiduciary stands to profit when it denies a claim or terminates benefits. The savings flow directly to the employer's treasury. This is true, first, because there is frequently no segregated fund from which the employer pays benefits. Employer-controlled welfare benefit plans (e.g., for health, vision, disability and life insurance) need not be funded. (See 29 U.S.C. § 1081 (a)(1); see also *BNA Daily Labor Report*, No. 152 (8-7-84), pp. C-1 to C-3, observing that very few employer-controlled retiree insurance plans are in fact

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[7] In most cases, a district court can strike a demand for punitive damages very early in the case, after very minimal discovery. Thus, contrary to the fears of trust fund amici (see Brief for Northern California Carpenters' Trust, etc., pp. 5-6) lengthy discovery into defendant's assets, for punitive damage purposes, would be precluded.

To further discourage unfounded punitive damage claims, this Court could even go so far as to announce a *per se* rule. The rule would simply make punitive damages (and even extra-contractual compensatory relief) *unavailable* where a participant sues joint labor-management trustees for untimely or improper processing of participants' claim, where there is no opportunity for self-dealing. *Cf.*, 22 *Am. Jur.* 2d, Damages § 253, pp. 346-47. The Court's imposing *per se* rules as "judicial gloss on . . . statutory language" has precedent in antitrust law. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977).

[8] 8,707,000 of the nation's 52,271,000 pension plan participants are in multiemployer plans. "Estimates of Participants and Financial Characteristics of Private Pension Plans," U.S. Department of Labor, Labor-Management Services Administration, Office of Pension and Welfare Programs (1983), p. 12, Table 6. Virtually all multiemployer plans are Taft-Hartley plans. Virtually all single-employer plans are *non*-Taft-Hartley plans.

[9] Cooper, R.D., *Multiemployer Health and Welfare Plan Operations and Expenses (Multiemployer Health and Welfare Plan)*, p. 14 (1983). International Foundation of Employee Benefit Plans, Brookfield, Wisconsin.

[10] In fact, 60% of pension plan participants and 68% of health plan participants are without any union representation. Beller, Daniel, "Coverage Patterns of Full-Time Employees Under Private Pension Plans," *Social Security Bulletin* (July, 1981), p. 7, Table 4 (showing 12,036,000 of a total 29,867,000 pension plan participants in union negotiated plans); Hoffman, Arnold, "Group Health Insurance Coverage of Private Full-Time Wage and Salaried Workers" (Unpublished Study of U.S. Department of Labor, Office of Pension and Welfare Benefit Plans (1979)) (showing 14,042,000 of 43,607,000 health plan participants in union negotiated plans).

Unlike Steelworker participants, participants in the non-union plans do not even have the benefit of collective bargaining representatives who can question the employer-fiduciary's actions and give support to the participants in pursuing their claims.

prefunded). Consequently, many employers act as self-insurers for these types of benefits, and do not set aside any funds for future benefits. Benefits denied equal monies saved.[11] Even some pension benefits of employer-controlled plans need not be funded. For example, the employer need not fund certain early retirement "shut-down" pensions, eligibility for which depends upon factors other than the actuarially determined life expectancies of participants. Among such factors are plant shutdown. See *Sutton v. Weirton Steel*, 724 F.2d 406, 411-12 (4th Cir. 1983), *cert. denied*, 104 S.Ct. 2387 (1984). ("No provision of the Act requires this contingent liability to be funded as an asset of the plan . . . [T]he only source of payment would be the company's treasury.") Second, even where an employer maintains a fund to support the typical defined-benefit single-employer plan, that employer still reaps a profit when it interprets eligibility requirements restrictively and denies claims. ERISA only requires minimal funding based upon the actuarially determined life expectancies of participants. 29 U.S.C. § 1082. The fewer claims the employer pays, the smaller the contributions the employer will have to make in the future.

Employer-controlled plans not only tempt employers to deny benefits for direct monetary gain; there are opportunities for other types of self-dealing. For example, the employer can use pension fund assets for personal investments.[12] It can threaten to terminate—or actually terminate—benefits to gain collective bargaining leverage.[13] It can fraudulently misrepresent to participants

[11] Apparently, in neither of Massachusetts Mutual's disability plans were benefits administered through a separate segregated fund. In one, benefits were paid "from the assets of the company," and, in the other, through an insurance policy. *Russell*, 722 F.2d at 486.

[12] See footnote 18, *infra*, and accompanying text.

[13] See footnote 17, *infra*, and accompanying text.

their respective shares payable in a profit-sharing plan.[14]

Because opportunities for self-dealing and inherent conflicts of interest abound, courts don't apply the deferential "arbitrary and capricious" standard to employer-fiduciaries of employer-controlled plans. Rather, courts enforce the stringent duty of loyalty to participants which ERISA exacts. For example, the Second Circuit in *Donovan v. Bierwirth, supra*, 680 F.2d at 271, stressed the fiduciaries' duty to avoid positions "where their acts as officers or directors of the corporation will prevent . . . complete loyalty to participants . . ."; see also *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629, 639-44 (W.D. Wis. 1979); *Corley v. Hecht Co.*, 530 F. Supp. 1155 (D.D.C. 1982). If the fiduciaries' own interests conflict with those of the participants, the fiduciary should step aside, appointing a neutral administrator to make the decision. *Bierwirth, supra*, 680 F.2d at 271-72. When the fiduciary retains authority, his actions are subjected to close scrutiny. *Leigh v. Engle, supra*, 727 F.2d at 125; *Bierwirth, supra*, 680 F.2d 271-76; *Viggiano v. Shenango China*, 574 F. Supp. 861, 866-67 (W.D. Pa. 1983); *cf., NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-37 (rule against a fiduciary "dividing his loyalties must be enforced with 'uncompromising rigidity.'" *Id.* at 329-30). III *Scott on Trusts* § 187, p. 1524 (in determining whether trustee has abused his broad discretionary powers afforded by trust instrument, courts look to whether trustee's interests conflict with those of beneficiary).

Struble v. N.J. Brewery Emp. Welfare Trust Fund, 732 F.2d 325 (3d Cir. 1984), applied this principle to a joint labor-management trust fund and its trustee fiduciaries. The *Struble* Court held the "arbitrary and capricious" standard applicable only where "individual claimants challeng[e] the [labor-management] trustees'

[14] See *Monson v. Century Mfg. Co.*, 739 F.2d 1293 (8th Cir. 1984) (finding punitive damages appropriate in such situation).

denial of benefits [and when] the issue . . . is whether the trustees have correctly balanced the interests of present claimants against the interests of future claimants." By contrast, the *strict standard* applies when the "gravamen of the complaint" is that fiduciaries "have sacrificed valid interests *to advance the interests of non-beneficiaries.*" *Id.* at 333-34 (emphasis added).[15]

For the foregoing reasons, we disagree with the position of Petitioners and certain amici that Massachusetts Mutual's conduct, as fiduciary, is judged by the "arbitrary and capricious" standard. Had Massachusetts Mutual denied Ms. Russell's claim, the money saved would have gone directly to the Company—placing it in a conflict-of-interest situation. While plaintiff did not address this issue below, the Ninth Circuit apparently considered the arbitrary and capricious standard applicable. (See *Russell;* 722 F.2d at 489 and footnote 7). The Ninth Circuit went on to conclude, however, that "ERISA may require a stricter standard" than a union's duty of fair representation. (Citing *Vaca v. Sipes,* 386 U.S. 171, 192 (1967); *Robesky v. Qantas Empire Airways,* 573 F.2d 1082, 1089-90 (9th Cir. 1978). We believe that where the ERISA fiduciary is in a conflict-of-interest situation,

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[15] Federal courts applying the arbitrary and capricious standard to Taft-Hartley fiduciaries have also relied on trust instruments, quite typical among Taft-Hartley trusts, which grant trustees broad discretion to interpret eligibility requirements and process claims. *Kosty v. Lewis,* 319 F.2d 744, 747 (1963), *cert. denied,* 375 U.S. 964 (1964); *Roark v. Lewis,* 401 F.2d 425, 426-27 (D.C. Cir. 1968); see also III *Scott on Trusts,* § 187, p. 1501 (where terms of trust grant trustee discretion, court will not interfere if trustee's action is "within the bounds of reasonable judgment"). This Court has recently indicated that the arbitrary and capricious standard does not apply where parties to collective bargaining do not grant trustees wide latitude to interpret the provision in question. *United Mine Workers v. Robinson,* 455 U.S. 562, 573-74 (1982). Thus, the deferential standard would not apply to those employer-controlled collectively bargained plans in which unions (such as amicus herein) do not grant such discretionary powers.

ERISA requires a *much* stricter standard than does the fair representation duty. However, where there is no conflict of interest, ERISA and Section 302(c) of Taft-Hartley impose a standard no more stringent than the deferential one applicable to a union's duty of fair representation. Accordingly, it may very well be appropriate for the Court to hold that punitive damages are, *per se,* not recoverable against Taft-Hartley funds in typical claims-processing situations. *Cf., International Brotherhood of Electrical Workers v. Foust,* 442 U.S. 42 (1979) (punitive damages not recoverable in duty of fair representation lawsuits). See also, footnote 7, *supra.* But punitive damages may be awarded where trustees' interests conflict with those of the participants.

This Court should also be aware that there are more serious types of fiduciary breach than that which plaintiff Russell alleges. Plaintiff Russell alleges that the fiduciaries took 132 days to process her claim, rather than the 120 days which ERISA regulations require. One would hardly search here for the "malice or wanton indifference" which is the prerequisite for punitive damages. It is for this reason that Petitioners and their supporting amici fix upon these facts when they argue that only very limited relief is available in ERISA cases. In their brief, Petitioners stress repeatedly that "the Court need look no further than this case for an illustration" of why punitive and pain and suffering damages should be unavailable. Petitioners' Brief, pp. 38, 27. Thus, Steelworkers urge the Court to employ a broader field of vision. We urge the Court to consider the following four examples of serious fiduciary breach:

EXAMPLE No. 1.

Jones, a plan participant in an employer-controlled plan, is rushed to the hospital with a heart ailment. Doctors determine that only a heart transplant can save him. A good donor with a very compatible blood type is available. Since heart transplants cost many

thousands of dollars, the hospital checks with the employer-administrator to determine whether Jones' insurance plan covers the operation. While the plan clearly covers transplants, the employer personally disfavors them. In addition, he intensely dislikes employee Jones. The employer delays in notifying the hospital that the plan covers transplants. As a result, Jones dies of cardiac arrest.

EXAMPLE No. 2.

An employer is sole administrator of a collectively bargained unfunded health insurance plan for retired employees. These retirees may number in the hundreds or even thousands. Over the years, employer-representatives administering the plan have told employees that their insurance benefit, like their pensions, lasts throughout their lifetimes. Moreover, the plan's language also indicates a benefit that lasts for life. Nevertheless, in closing its plant, the employer-fiduciary terminates insurance for all retired people. The retirees, elderly and living on fixed incomes, are forced to go without needed medical care. Their medical problems become aggravated, possibly causing some deaths. The employer thus forces the participants to bring suit. While the employer knows there is little chance of successfully defending the suit on the merits, it feels it has nothing to lose. If it wins by some fluke (or because plaintiffs cannot match highly paid corporate counsel) then it saves millions of dollars it would have otherwise had to spend on this unfunded benefit. It will save even in losing. First, absent punitive damages, no onerous non-contractual liability need concern it. Second, participants will cut back their use of medical services when the plan terminates. Therefore, participants' recovery of out-of-pocket expenses will rarely equal the amount the employer would have had to pay had it continued insurance premiums (or self-coverage, if its plan is self-insured.) In any event, the employer most likely has no intention of defending the lawsuit to its conclusion. Rather, it hopes to gain a settlement from the desperate participants

which will shave millions of dollars off its expected liability. It hopes to gain settlement through direct lump-sum offers to individual participants (e.g., *UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1483 and footnote 9 (6th Cir. 1983), *cert. denied*, 104 S.Ct. 1002 (1984)), or through a class-wide settlement.[16]

EXAMPLE No. 3.

A collectively-bargained health insurance plan obligates an employer to continue insurance for active

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[16] This example is anything but hypothetical. The following is only a partial list of cases (including cases brought by Steelworker, Auto Worker and non-union retirees) in which employers have recently discontinued this retirement insurance benefit. *Alford v. Strichman*, Civ. Action No. 84-20 (pending in W.D. Pa.) (involving termination of retiree benefits for over 4,500 pensioners and surviving spouses; discussed in Johnson, Haynes, "Steel Valley's Bitter Scrap," *Washington Post* (January 28, 1984, p. 1); defendant Colt Industries has recently made, over the objection of plaintiffs' counsel, unilateral lump sum settlement offers to participants); *Mamula v. Satralloy, Inc.*, 100 CCH Labor Cases ¶ 10,770 (S.D. Ohio 1983); *Hansen v. White Farm Equipment Co.*, 5 Employee Benefit Cases 2130 (N.D. Ohio 1984); *Eardman v. Bethelhem Steel Corp.*, 5 Employee Benefit Cases 1985 (W.D.N.Y. 1984); *UAW v. Yard-Man, Inc., supra; UAW v. Cadillac Malleable Iron Co.*, 728 F.2d 807 (6th Cir. 1984); *Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984); *Puz v. Bessemer Cement Co.*, Civ. Action No. 82-2378 (pending in W.D. Pa.); *Keffer v. Connors Steel Co.*, Civ. Action No. 84-3137 (pending in S.D.W. Va.); *Trebus v. Youngstown Steel Door*, Civil Action No. 84-3413Y (pending in N.D. Ohio); *United Steelworkers, et al. v. Dayton-Walther Corp.*, Civ. Action No. 3-84-640 (pending in S.D. Ohio); *UAW v. Federal Forge, Inc.*, 583 F. Supp. 1350 (W.D. Mich. 1984); *Local Union No. 150-A, etc. v. Dubuque Packing Co.*, Civil Action No. 83-1037 (April 26, 1984 Order, N.D. Iowa); *Steelworkers Local 2341 v. Whitehead & Kales Co.*, 94 CCH Labor Cases ¶ 13,600 (E.D. Mich. 1982); *Anderson v. Alpha Portland Cement*, 727 F.2d 177, 180 (8th Cir. 1984); *Bunch v. Pacific States Steel Corp.*, Civ. Action No. 80-4042 (N.D. Calif.); *Grimaldi v. Teledyne Mid-America Corp.*, Civ. Action No. B-83-7 (pending in D.Conn.); *Policy v. Powell Pressed Steel Co.*, Civ. Action No. C82-2402Y (pending in N.D. Ohio and Sixth Circuit Court of Appeals).

employees, even while they are on strike. The employer has continued the insurance during past strikes. Nevertheless, at the end of negotiations when the contract expires, the employer notifies the union that it is terminating coverage. While the plan itself allows a participant a 30-day grace period to purchase insurance retroactively even upon *proper* termination, the employer simply notifies hospitals and employees that coverage has ceased. As a result, employees entering hospital emergency rooms, including a woman in labor, are told that they will not be admitted unless they agree to pay the bills directly. Understandably, these incidents cause extreme emotional distress. The employer's obvious motivation for this unlawful and widely-publicized termination of coverage is to bring pressure upon the employees and their union in collective bargaining negotiations. The employees are forced to sue. Without punitive damages, the employer feels it has nothing to lose. Attorneys' fees are a cheap price for the leverage the employer gained in negotiations.[17]

EXAMPLE No. 4.

Top officers of Company A are also trustees and fiduciaries of Company A's employer-controlled pension plan. These officers seek control over the smaller, more lucrative Company B. But Company B does not wish to be acquired, and Company A's treasury and credit line are insufficient to mount an unfriendly takeover bid. Therefore, Company A's officers use its pension plan's substantial assets to finance their tender offer. While this use exposes the pension fund assets to considerable risk, the takeover succeeds and it reaps handsome profits for Company A and even for the pension fund. The plan participants bring suit. However, without the threat of punitive damages, neither Company A's

[17] See *Viggiano v. Shenango China, supra,* 574 F. Supp. at 867; *United Steelworkers v. Fort Pitt Steel Castings,* 452 F. Supp. 886, 890 (W.D. Pa. 1978), *affirmed,* 598 F.2d 1273 (3d Cir. 1979).

officers nor fiduciaries of other employer-controlled plans are deterred from engaging in like conduct in future years.[18]

In sum, most of the nation's ERISA plans are employer-controlled. As such, the employer's administration of the plan presents ample opportunity for unlawful self-dealing, malice toward participants, and consequential distress and hardship for participants. The foregoing examples illustrate this problem of an employer-fiduciary in a conflict-of-interest situation. While courts closely scrutinize such employer's conduct when there is opportunity for self-dealing, there is little to deter that employer and other employers[19] from engaging in such future conduct when punitive damages and extra-contractual compensatory relief are precluded. A much smaller number of plans are joint labor-management "Taft-Hartley" trusts, the administration of which presents far fewer opportunities for self-dealing. Trustees of Taft-Hartley plans have little to fear from the Ninth Circuit's opinion below. The trustees' conduct is generally judged by the "arbitrary and capricious" standard, and, in any event, plaintiffs must prove that such conduct was malicious or carried out with wanton indifference to plaintiffs' rights.

[18] See, e.g., *Leigh v. Engle, supra,* 727 F.2d 113; *Donovan v. Bierwith, supra,* 680 F.2d 263.

[19] Exemplary damages serve "as a warning and example to deter [defendant] *and others* from committing like offenses in the future." 22 *Am. Jur.* 2d, Damages § 237, p. 323 (emphasis added). Thus, far from opening the "floodgates" for litigation, as Petitioners allege, allowing such relief will discourage unlawful conduct and thus decrease the likelihood of litigation.

CONCLUSION

Based upon the foregoing, the amicus Steelworkers respectfully urges this Court to affirm the Ninth Circuit's decision below, which holds that participants may recover —in limited circumstances—exemplary damages and extra-contractual compensatory relief under Section 409 (a) of ERISA.

Respectfully submitted,

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